PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

2001 K STREET, NW
WASHINGTON, DC 20006-1047

TELEPHONE (202) 223-7300
FACSIMILE (202) 223-5694

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

1285 AVENUE OF THE AMERICAS
NEW YORK, NY 10019-6064
TELEPHONE (212) 373-3000
FACSIMILE (212) 757-3990

UNIT 3601, FORTUNE PLAZA OFFICE TOWER A
NO. 7 DONG SANHUAN ZHONGLU
CHAO YANG DISTRICT
BEIJING 100020
PEOPLE'S REPUBLIC OF CHINA
TELEPHONE (86-10) 5828-6300
FACSIMILE (86-10) 6530-9070/9080

12TH FLOOR, HONG KONG CLUB BUILDING
3A CHATER ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300
FACSIMILE (852) 2840-4300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, U.K.
TELEPHONE (44 20) 7367 1600
FACSIMILE (44 20) 7367 1650

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101
FACSIMILE (81-3) 3597-8120

WRITER'S DIRECT DIAL NUMBER
202-223-7373

WRITER'S DIRECT FACSIMILE
202-204-7373

WRITER'S DIRECT E-MAIL ADDRESS
hbrands@paulweiss.com

January 8, 2010

Filed Electronically

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte Presentation in MB Docket Nos. 07-29 and 07-198

Dear Ms. Dortch:

This is the response of Cablevision Systems Corporation to an *ex parte* letter that was filed on December 29, 2009, by the Coalition for Competitive Access to Content ("CA2C").

1. CA2C's letter addresses a basic problem that must worry anyone who advocates that the Commission rely on Section 628(b) to prohibit the withholding of terrestrial programming. Section 628(b) extends its prohibitions to only three kinds of entities: (1) "a cable operator," (2) "a satellite cable programming vendor in which a cable operator has an attributable interest," and (3) "a satellite broadcast programming vendor." And a vendor of terrestrial programming is not captured by any of these three categories.

A vendor of terrestrial programming is not a "cable operator." That term is defined as an entity that operates a cable system. 47 U.S.C. § 522(5). A programming

service is not a cable system. And Section 628(b) itself makes clear that a programmer does not become a "cable operator" merely because a cable operator holds an interest in the programmer: Section 628(b) separately mentions a "cable operator" and a "programming vendor in which a cable operator has an attributable interest." If that attributable interest would automatically convert a programming vendor into a cable operator, the term "programming vendor in which a cable operator has an attributable interest" would be rendered superfluous.

Nor is a vendor of terrestrial programming a "satellite cable programming vendor." The term "satellite cable programming vendor" is defined as "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming . . . ." 47 U.S.C. § 548(i)(2). "Satellite cable programming" is defined as "video programming which is transmitted via satellite . . . ." 47 U.S.C. § 605(d)(1). By definition, terrestrial programming is not "transmitted via satellite." For similar reasons, a vendor of terrestrial programming is not a "satellite broadcast programming vendor" either.

In sum, a programming vendor cannot violate Section 628(b) by withholding terrestrial programming. The D.C. Circuit's recent MDU decision (*NCTA v. FCC*, 567 F.3d 659 (D.C. Cir. 2009)) does not solve this problem: that decision merely held that, when unfair conduct is engaged in by a ***cable operator***, that conduct may be unlawful even if it does not involve the withholding of programming. The D.C. Circuit's decision did not turn a vendor of terrestrial programming into a "satellite cable programming vendor."

2. This aspect of Section 628(b) confirms a more general point that Cablevision has advanced throughout this proceeding: Section 628(b) cannot be read to authorize rules prohibiting the withholding of terrestrial programming. It is inconceivable that, if Congress had intended to authorize such rules, it would have provided that Section 628(b) can be violated only by a "satellite . . . programming vendor." Instead, Congress would have provided that Section 628(b) can be violated by any "video programming vendor" — a term that it specifically used and defined elsewhere. 47 U.S.C. § 536(b).

As we previously explained, this is not the only indication of Congress's intent to preclude rules prohibiting the withholding of terrestrial programming. In addition, Section 628(b) requires that conduct have the "purpose or effect . . . to hinder significantly . . . any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." When an entrant MVPD is denied access to terrestrial programming, it is hindered only in providing terrestrial programming, not satellite programming. The MDU decision is distinguishable: arrangements barring entrant MVPDs from entering MDU buildings hindered the provision of all programming, including satellite programming. Thus, using Section

628(b) to target the withholding of terrestrial programming would extend a decision that already subjects Section 628's text to significant strain.[1]

More generally, Section 628(c)(2) specifically addresses the withholding of programming, yet it carefully and expressly limits its prohibitions to satellite programming. An agency may not "rely on its general authority to make rules . . . when a specific statutory directive defines [its] relevant functions . . . in a particular area." *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995). Let it be assumed for purposes of debate that Section 628(c)(2) leaves the Commission free to make rules in areas not addressed in Section 628(c)(2), such as exclusive building agreements. Even on that assumption, the Commission may not rely on its general rulemaking authority to make rules concerning the withholding of programming.[2] In that specific area, Section 628(c)(2) defines the Commission's functions.[3] As the D.C. Circuit

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[1] Indeed, although nothing in this letter turns on it, we submit that the D.C. Circuit stretched Section 628's text well beyond the breaking point. The court in effect conceded that, if Section 628(b) would have required an effect on the provision of "Spanish-language programming," the Commission could not have relied on Section 628(b) to prohibit conduct not involving Spanish-language programming. *See* 567 F.3d at 665-66. But the D.C. Circuit distinguished that hypothetical statute by observing that, whereas "Spanish-language programming would rightly be understood as a niche," "satellite programming is hardly a niche." *Id.* at 666. The court ignored, however, that Section 628(b) requires an effect upon the provision of "satellite cable programming *or satellite broadcast programming*." 47 U.S.C. § 548(b) (emphasis added). "Satellite broadcast programming" is even more niche-like than Spanish-language programming — it captures only so-called superstations, of which only a handful exist. If Congress had meant to empower the Commission to tackle unfair conduct of any kind, it would not have said "satellite cable programming *or satellite broadcast programming*" — no more than it would have said "English-language or Spanish-language programming."

[2] The Commission cannot rely on Section 628(c)(1). That provision authorized the Commission to "prescribe regulations to specify particular conduct that is prohibited by subsection (b)," but it limited that authorization to the "180 days after the date of enactment of this section." In any event, to abrogate the clear limits of Section 628(c)(2), the Commission may no more rely on Section 628(c)(1) than it can rely on its general rulemaking authority — for the reasons stated in the text.

[3] For example, the Commission clearly could not rely on Section 628(b) to eliminate the limitation contained in Section 628(h)(1), which states that "[n]othing in [Section 628] shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990 . . . ." 47 U.S.C. § 548(h)(1). The Commission may no more eliminate

noted in the MDU case, agencies lack authority to construe a statute in a manner that would "render nugatory restrictions that Congress has imposed." 567 F.3d at 666.

3. CA2C seeks to solve the basic problem that Section 628(b) reaches only vendors of satellite programming through various forms of "legal jujitsu."[4] CA2C argues that a vendor of terrestrial programming can be characterized as a "satellite cable programming vendor" — at least if, beside selling terrestrial programming, the vendor also sells satellite programming. CA2C further argues that, even when a vendor of terrestrial programming does not sell any satellite programming, the Commission can still tackle its withholding by going after the affiliated cable operator — on the theory that the vendor's withholding may be presumed to have resulted from the cable operator's influence and control.

Even on its own terms, CA2C's jujitsu is unconvincing.

As for characterizing a vendor of terrestrial programming as a "satellite cable programming vendor," CA2C's argument runs headlong into the plain statutory text. Insofar as a programming vendor sells terrestrial programming, it is a vendor of terrestrial programming — not a vendor of satellite programming. CA2C's contrary argument is incompatible with the argument that its telco members successfully pressed in ***Bell Atlantic Telephone Cos. v. FCC***, 19 F.3d 1475 (D.C. Cir. 1994). There, telephone companies convinced the D.C. Circuit that, when a firm provides both a common-carrier service and a private-carrier service, it cannot be characterized as a "common carrier" insofar as it provides the private-carrier service.[5] Just so here: when a firm provides both a terrestrial service and a satellite service, it cannot be characterized as a "satellite programming vendor" insofar as it provides the terrestrial service.

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the limitation contained in Section 628(c)(2)(D), which states that exclusive agreements are prohibited only insofar as they involve "satellite cable programming or satellite broadcast programming."

4 *Association of Communications Enters. v. FCC*, 235 F.3d 662, 667 (D.C. Cir. 2001).

5 19 F.3d at 1481 ("Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis . . . , the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier. . . . The mere fact that petitioners are common carriers with respect to some forms of telecommunication does not relieve the Commission from supporting its conclusion that petitioners provide dark fiber on a common carrier basis.").

As for the argument that any withholding by a cable-affiliated programmer may be presumed to be the result of influence or control by the affiliated cable operator, CA2C again ignores Section 628's plain text. Section 628(b) separately mentions a "cable operator" and a "satellite cable programming vendor in which a cable operator has an attributable interest." If CA2C's theory (under which any conduct by a cable-affiliated programming vendor can be attributed to the cable operator) were correct, Section 628(b)'s mention of "satellite cable programming vendor in which a cable operator has an attributable interest" would be superfluous. Acceptance of CA2C's argument would also signal an abrupt departure from the Commission's current approach toward unilateral refusals to deal, which, far from involving any presumptions, analyzes refusals according to "antitrust precedents."[6]

More fundamentally, the strain that CA2C's legal jujitsu places on the statutory text helps prove our more fundamental point — that Section 628 cannot reasonably be read to reach the withholding of terrestrial programming at all. If Congress had wished to empower the Commission to strike at such withholding, Congress would not have required the Commission to tie itself into CA2C's definitional pretzels. Instead, Congress would have straightforwardly prohibited unfair conduct by all cable programming vendors — not just ***satellite*** cable programming vendors. By failing to take the broader approach, Congress made unmistakably clear that conduct involving terrestrial programming is off-limits.

* * *

Thank you for your assistance. If you have any questions, please call me at 202-223-7373.

Respectfully submitted,

/s/

Henk Brands

cc: Austin Schlick
Stuart Benjamin
Marilyn Sonn
Susan Aaron
William Lake

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[6] *Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶ 116 (1993).

Robert Ratcliffe
Nancy Murphy
Steven Broeckaert
Mary Beth Murphy
David Konczal
Diana Sokolow
Sherrese Smith
Joshua Cinelli
Jamila Bess Johnson
Rick Kaplan
Rosemary Harold
Millie Kerr